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In The

Supreme Court of the United States

October Term, 1979

No. 79-54

City of Los Angeles, *et al.*, *Petitioners,*

v.

Fanchon Blake, *et al.*, *Respondents*

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v.

United States, *Respondent*

AMICUS CURIAE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE

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JURISDICTION

This brief is filed pursuant to Rule 42 of the Supreme Court Rules. Consent to file an amicus curiae petition for writ of certiorari has been granted by Mr. Neal C. Baker, Counsel for the Petitioner; Mr. Wade H. McCree, Jr., Solicitor General of the United States; and Mr. A. Thomas Hunt, Counsel for the Respondent Blake. Letters of consent have been filed with the Clerk of this Court.

STATEMENT OF INTEREST

The California Peace Officers Association is a nonprofit professional association with membership of over 10,000 local, county and state peace officers throughout the state of California. The association, which has been in existence for 55 years, has worked to upgrade peace officers through publications as well as training endeavors. The association has also been actively involved in the legislative arena. Based on studies of physical fitness standards done under LEAA grants by the Commission on Peace Officer Standards and Training, the association strongly feels that the termination of federal funds received by the Los Angeles Police Department is premature.

The International Association of Chiefs of Police, Inc. (IACP) represents over 8,800 chiefs and top executives of American police departments and other law enforcement agencies in all 50 states and 61 foreign countries. The IACP serves the law enforcement profession and the public interest by advancing the art of police service. Its aims are to foster police cooperation and the exchange of information and experience among police administrators throughout the world, and to encourage adherence by all police officers to high professional standards of performance and conduct. With regard to law-related activities in police professionalism, the IACP in 1970 formed the Police Legal Center of the IACP. This center serves as a hub for legal advisors and police legal units nationwide, and publishes numerous periodicals, documents, and in-service legal training materials for use both by police officers and executives.

The interest of both amici in the instant case stems from the importance of the issues involved, the resolution of which will

have a direct and material impact upon the effectiveness of law enforcement.

In holding that the city has not met the burden of proving the lawfulness of its height requirement and physical agility test, the Circuit Court in *Blake* adopted a standard of proof for employers which will be impossible to meet. National interest exists in resolving the constitutionality of a rule of law which provides for shifting the burden of proof against a governmental entity on the basis of statistics which are not probative of intentional discrimination. This case provides an opportunity for this Court to clarify the standard for a prima facie case against a governmental entity.

In its *Blake* decision, the Ninth Circuit ruled that police agencies must utilize alternative policies of law enforcement to lessen the adverse impact that selection standards may have on a particular group. This mandate ignores the fundamental concept of local control of police policies and will have a detrimental impact on the concept of local law enforcement. A number of factors affect the stringency of the selection process adopted by a police agency, including special competence, interests and needs, as well as the style of law enforcement to be implemented and the character of the community the police agency serves.

Police departments which do not adopt the alternative policies will be theatened with back pay liability and the termination of federal funding. Agencies which do modify their policies may be placed in the position of adopting a style of law enforcement which is not best suited for the communities they serve. The writ of certiorari should be granted to ensure that local police departments may continue to establish law enforcement policies on the basis of local needs and priorities.

With regard to the issue of hiring individuals not meeting selection standards to demonstrate the business necessity of selection requirements, such a procedure overlooks the concept of merit selection in civil service employment and the cost of training police officers. Further, this procedure provokes concern with regard to the civil liability of police agencies and municipalities. The ever-increasing possibility of being sued for actions taken by officers during the performance of duty is a vital

concern among law enforcement administrators. Individuals hired to demonstrate the business necessity of a selection standard may become the source of suits against the police agency or the municipality on such theories as negligent appointment, negligent assignment, or negligent retention.

With regard to the issue that the dual classification of police officers prior to 1973 violated constitutional equal protection, amici wish to support the position taken by the Petitioner, the City of Los Angeles, namely that liability should not result from an action which at the time taken was progressive and socially responsible.

Amici urge the court to provide guidance for local police agencies as to how compliance with federally mandated quotas can be accommodated within the rules of a civil service merit system. Finally, standards for the granting of a preliminary injunction enjoining the termination of federal funds should be established by the Court.

REASONS FOR GRANTING THE WRIT

I

In the *Blake* decision, the Ninth Circuit Ignored the Fundamental Concept of Local Control of Police Policies.

In its *Blake* decision, the Court of Appeals held that the Police Department is obligated to utilize alternative policies of law enforcement if those alternatives would permit the Department to hire police officers by using selection standards which have less adverse impact on a particular group. In other words, a police department may no longer meet its burden of demonstrating that its selection devices are lawful under Title VII of the 1964 Civil Rights Act, as amended, by showing that those standards are related to the tasks which a police department requires its officers to perform. Rather, that police department must also demonstrate that it could not restructure the tasks performed by those police officers to minimize the need for aselection standard having an adverse impact on a racial, ethnic, or sex group. That rule of law, unless reviewed by his Court, will

have a dramatic and detrimental impact upon the concept of local law enforcement as it traditionally has been implemented in this country.

It is common knowledge among students of police science that different communities have different "styles" of law enforcement. In a now classic study of eight police departments, Professor J. Wilson theorized that police departments may be divided into three separate models: the "watchman style," the "legalistic style," and the "service style." J. Wilson, *Varieties of Police Behavior* (1968). The author selected those eight communities, "[b]ecause the amount of police activity and the way that police discretion is used will depend in part on the character of the community . . . ." *Id.* at 89.

Later, after reviewing his data, Professor Wilson found that, even between cities of the same relative populations, there were tremendous differences in traffic enforcement, policies regarding gambling and vice, juvenile arrest rates, and public drunkeness. *Id.* at pp. 95-96, 99, 114, and 122-125. As a result of his study, Professor Wilson theorized that law enforcement agencies respond to different needs, depending upon the communities that they serve. *Id.* at 287.

The style of the law enforcement agency will influence the tasks performed by its police officers. For example, when a department faces a serious crime problem in its jurisdiction, it may utilize plainclothes officers to apprehend as many suspects as possible, while another department may attempt to suppress crime by saturating the area with identifiable police officers. Still other agencies will emphasize the involvement of community service organizations to deal with the social problems which are perceived to be leading to the crime wave. See J. Kuykendall and P. Usinger, *Community Police Administration* (1975) at pp. 27-28. In the past, the exercise of a style of police protection has been deemed by this Court to be a function which state and local governments "are created to provide . . . ." *National League of Cities v. Usery*, 426 U.S. 833, 851 (1976).

Indeed, in some jurisdictions, police departments have chosen to drop physical selection standards completely, and willingly accept the change of police policies which results from a lack of selection standards. For example, in the early 1970s, the

Washington Metropolitan Police Department and the Police Foundation studied the performance of 86 women hired as metropolitan police officers and an equal number of men. While those individuals were matched with respect to many personnel criteria, they had been hired without the use of a physical ability test. Further, the women averaged one and a half inches shorter and 32 pounds lighter than the men. Block & Anderson, *Policewomen on Patrol, Final Report* (Police Foundation, 1974) at p. 1.

Later, comparing the performance of the male group with the performance of the smaller, lighter, female group, the study established the following:

> (1) Men assigned to patrol averaged 53 citations for a six-month period, compared to 22.6 citations for similarly situated women. Men in all assignments averaged 49.8 citations, and similar females averaged 20.6. *Id.* at p. 24.
>
> (2) Males assigned to patrol averaged 4.8 felony arrests and 11.4 misdemeanor arrests in a six-month period, while women assigned to patrol averaged 1.8 felony arrests and 5.2 misdemeanor arrests. For individuals on all assignments, the males averaged 4.7 felony arrests and 10.8 misdemeanor arrests in a six-month period, while the women averaged 1.4 felony arrests and 3.9 misdemeanor arrests. *Id.* at p. 23.

Thus, the taller, male group issued twice as many traffic citations, made approximately three times the number of felony arrests, and made twice the misdemeanor arrests than the smaller, female group.

In other police departments, police managers have decided to utilize different acceptable levels of force in controlling resisting suspects. Typicaly, different communities have a varied tolerance for the use of force by police. The amici believe that an effective police department is one which accepts and adopts the approach which is best suited for its community.

The obvious risk of the decision by the Ninth Circuit is that every police department in the country will be forced (1) to

modify its policies to accept higher levels of force by police officers, and/or (2) to assign police officers with the understanding that many of the lighter and smaller individuals will not initiate as many arrests and traffic citations as the more physically qualified individuals. The alternative to the development of such policies is the threat of catastrophic back pay liability and the termination of federal funding; threats which now are being made against the City of Los Angeles as a result of the Ninth Circuit's decision. Such a choice is unacceptale to the amici, and they urge this Court to grant the writ of certiorari to consider that issue.

II

Notwithstanding the Problem of "Alternatives", the Ninth Circuit's Decision has Made it Impossible for a Police Agency to Demonstrate the Lawfulness of its Selection Standards.

Apart from the "Alternatives" theory, the Ninth Circuit's decision is also detrimental to law enforcement because it makes impossible a demonstration of the lawfulness of any physical selection standard. That decision, which requires an agency to hire individuals not meeting its height and physical ability standards so that those individuals could be studied, violates common sense and overlooks a concept of merit selection in civil service employment.

First, as the District Court stated, the Los Angeles Police Department's evidence pointed out "what is obvious and needs little proof." *Blake v. City of Los Angeles, supra,* 435 F. Supp. at 65. That evidence suggested "that a stronger and taller officer can more quickly and effectively control another person in the event of a confrontation. This officer is likely to be able to do so without having to resort to an extreme force, such as the use of a gun or dangerous control hold. In self-defense situations, the taller and stronger officer is more likely to be successful. The taller the officer, the better his opportunity to observe, evaluate, and properly judge situations in the field." *Id.* Given that evidence, any chief of police would be derelict in his duty to protect the public if he were to hire individuals who do not meet those qualifications merely for an academic study.

Assuming, arguendo, that such a study would serve a useful purpose to demonstrate the "business necessity" of common sense selection requirements, the view of the Court of Appeals that individuals not meeting those selection requirements could be hired and trained for the purpose of that validation study overlooks the principles of civil service merit selection, and the cost of training police officers. First, civil service merit selection is not a pretext for racism. As the U.S. Court of Appeals for the Second Circuit has stated:

> Civil Service laws, like civil rights laws, were enacted to ameliorate a social evil. In the former case, it was the spoils system; in the latter, discrimination. *** It seems to us that the judiciary should act with great reluctance in undermining traditional civil service concepts; and if a decision is to be made to subordinate the social purposes of civil service to those of equal employment opportunity, that decision should be made by the people, speaking through their legislators. *Kirkland v. N.Y. State Department of Correctional Services,* 520 F. 2d 420, 428, 429 (2nd. Cir. 1975), *certiorari denied,* 429 U.S. 823 (1976).

Because of those civil service laws, a state or municipality cannot hire a qualified individual merely for the purpose of study, only to dispose of him or her after the study is over. Those individuals, by virtue of civil service protections, typically acquire a vested right to their positions.

Moreover, the Ninth Circuit's desire to hire individuals for the purpose of validation studies will be extremely wasteful in terms of tax dollars. Increasingly, public jurisdictions have become aware that police officers need to be well trained before they are sent out into the field. It is not uncommon to find police training programs, for which officers are fully salaried, lasting from five months to one year. Thus, the cost of training individuals to comply with the Ninth Circuit's desire for a perfect validation study to prove the lawfulness of the selection requirement will be prohibitive.

III

The Court of Appeals has Committed a Gross Error in Granting Judgement of the Plaintiffs on Grounds of Equal Protection as to the Use of Separate Classification of Policemen and Policewomen Prior to 1973.

The Supreme Court should also grant a writ of certiorari to the Ninth Circuit as a result of the lower court's ruling that the use of "Policeman" and "Policewoman" classifications prior to 1973 violated constitutional equal protection. In the early 1970s, the use of women in patrol positions was a novelty, limited to a handful of jurisdictions. In fact, many jurisdictions had no women in any sworn police function. The larger and more progressive police departments, including that of the City of Los Angeles, had policewomen performing limited duties such as the protection of children and the investigation of sex crimes. It would be a bitter irony if that use of sworn women personnel at a time when many police departments hired no women in sworn positions were to now result in a liability to that city.

IV

This Court Should Grant a Writ of Certiorari in *U.S. v. City of Los Angeles* on the Ground that Automatic LEAA Fund Termination Provision Should Not Apply Where the Objective of the Government has Been to Require Hiring Quotas.

The amici are very concerned about the pattern of coercion emanating from certain of the federal compliance agencies. When, as in this case, the coercion is intimately tied to funding of a police department, the policy makers in the local community are placed in an impossible position. First, those leaders have the responsibility to administer the personnel needs of the law enforcement agency by utilizing a civil service merit system. However, to continue receiving federal funding for law enforcement programs, they are forced to meet federally mandated quotas, even if those quotas mean abandoning selection standards which they believe to be lawful and job related.

The amici believe that provisions of the Omnibus Crime Control and Safe Streets Act 1968 (42 U.S.C. Section 3766 (c) (2) (E)) specifically forbid that untenable situation. We urge this Court to consider that issue so that local officials may be guided in their future actions with those compliance agencies.

CONCLUSION

For the foregoing reasons, the amici submit that a writ of certiorari should issue to review the judgement and opinion of the Ninth Circuit.

Respectfully submitted,

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